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No._____

In The

Supreme Court of the United States

October Term, 1966

D. R. SMALLEY & SONS, INC., Petitioner

V.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

D. R. Smalley & Sons, Inc., Petitioner, prays that a Writ of Certiorari issue to Review Order of the United States Court of Claims entered in the above entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims is printed in the Appendix A hereto, infra page 1a.

JURISDICTION

The final order of the United States Court of Claims (Appendix A) is dated February 17, 1967.

The jurisdiction of the Court is invoked under 28 United States Code 1255 (1).

QUESTIONS PRESENTED

1. Does Title 23 United State Code direct the Department of Commerce to obligate Federal funds through the State of Ohio specifically for the benefit of contractors who construct the Federal-Aid Highways, so as to allow a contractor to recover those funds as against the United States once such funds have been earned?

2. Does the language of Title 23 United States Code and the facts herein involved create an agency, with the individual state highway departments as agents for the Federal Bureau of Public Roads so as to obligate the United States to pay its proportional share of the cost of construction, as principal, to the contractor who constructs the Federal-Aid Highways therein contemplated?

3. Does the purpose and the control expressed in Title 23 United States Code constitute an Act of Congress such as to imply an obligation of the United States Government to pay just compensation to contractors for the construction of the Federal-Aid Highways?

4. Did the Congress, through its power to regulate Commerce and its authority to provide for the National Defense, take petitioner's property for a public use so as to obligate the United States to provide just compensation under the Fifth Amendment to the Constitution of the United States?

5. Did the Court of Claims err in dismissing Petitioner's Petition (considering the serious import of the questions presented and their public nature) on summary motion?

6. Was the action on the part of the United States Government such action as to fall within the sovereign immunity doctrine concerning acts of the United States Government? If so, do the provisions of Title 28 United States Code Section 1491, specifying the jurisdiction of the Court of Claims, operate as a waiver of this immunity so as to allow petitioner his day in court concerning the claims involved?

CONSTITUTIONAL PROVISIONS, STATUTES, and COURT RULES INVOLVED

1. Article V of the Amendments to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Rule 20(b), pg 17 1964 Revised Rules of the United States Court of Claims;

"Every defense, in law, or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of a provided in Rule 64, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 64."

3. Rule 64(b) (d) pg 77, 1964 Revised Rules of the United States Court of Claims:

(b) ". . . . a party against whom a claim or counterclaim is asserted may at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(d). . . . the judgement sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

4. Title 28 United States Code, section 1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1.) Founded on the Constitution.

(2.) Founded on an Act of Congress.

(3.) Founded on any regulation of an executive department.

(4.) Founded upon any express or implied Contract with the United States.

(5.) For liquidated or unliquidated damages not sounded in tort.

5. Title 23 United States Code as set forth in Appendix B.

6. Title 23 Code of Federal Regulations as set forth in the Appendix C.

STATEMENT OF THE CASE

The Petitioner, an Ohio Corporation engaged in the highway construction business, sued Respondent for damages in the sum of $6,000,000 in connection with six contracts executed in 1956 and 1957 for the building of certain Federal-Aid Highway projects in the State of Ohio.

In two of the contracts the Petitioner was the principal contractor, and in the other four it was a subcontractor under Maxon Construction Company, Inc., the principal contractor.

The contracts were awarded on a competitive bidding basis as prescribed by the Respondent and were forwarded to the Bureau of Public Roads for approval. Upon the approval of

the contracts, the Bureau of Public Roads authorized the State of Ohio to sign the contracts for the actual construction of the Federal-Aid Highways.

The Bureau of Public Roads prescribed the terms and the form of the contracts and the contracts specifically state that the construction of the highways are subject to the inspection, at all times, and approval of the Bureau of Public Roads, all in accordance with the rules and regulations of the Federal-Aid Highways Act. The terms of the contract, insofar as the contractors obligations are concerned, are designed to protect and benefit the Respondent as well as the State of Ohio.

Prior to the Petitioner submitting bids for the construction of Federal-Aid Highways it was necessary that it be approved by the Bureau of Public Roads.

In May of 1958 Petitioner encountered financial difficulty and was forced to close down all the existing jobs under construction. In July of 1958, Maxon Construction Company, Inc., notified the Ohio State Highway Department that they were about to default the Petitioner on all uncompleted sub-contracts. The Ohio State Highway Department, however, refused to honor such defaults. In August of 1958, W. C. Wright was contacted through the Ohio State Highway Department, for the purpose of having, him, W. C. Wright, re-organize the Petitioner's Corporation in order that the projects under construction could be completed. After numerous discussions with the Ohio State Highway Department and the Bureau of Public Roads, W. C. Wright was assured of the fullest cooperation in the re-organization of Petitioner's Corporation. In December of 1958, W. C. Wright agreed to reorganize the Petitioner's Corporation, which plan was accepted and approved by the Ohio State Highway Department and the Bureau of Public Roads.

The Petitioner completed all the obligations and requirements of the contracts and subsequent change orders required by and approved by the Bureau of Public Roads. The Bureau of Public Roads made continuous inspections throughout the period of construction of the highways and had personal knowledge of the reasonable additional costs for which Petitioner seeks recovery. Upon Petitioner's completion of the

contracts, the Bureau of Public Roads as well as the State of Ohio accepted and approved the completed projects.

The Petitioner was advised that he would have to secure reimbursement for its reasonable additional costs through the Ohio Sundry Claims Board, which is a non-judicial body, operates without any prescribed or uniform rules of procedure and is not a body of record. No provisions are made for appeal from this body to a judicial tribunal. It is also to be noted that the Respondent does not recognize the Sundry Claims Board as a body competent to determine such claims as herein involved and will not participate in any awards made by said Sundry Claims Board. A claim in the amount of $2,923,573.22 was filed with the Ohio Sundry Claims Board which approved and paid $195,690.00. Leaving a balance unpaid of $2,727,-883.22.

The basis of Petitioner's claim against the Respondent in that during the actual construction by Petitioner, the State of Ohio did not timely obtain right-of-way nor remove obstructions therefrom as required by 23 Code of Federal Regulations 1.23 (Appendix C, page 36a), did not promptly provide time extention as promised, required work to be done in wet and freezing weather, directed that work be done under traffic conditions, forced Petitioner to subcontract some of the work to others at increased costs and required revisions of the original plans and specifications. However, it must be understood that these actions on the part of the State of Ohio were done as required by, under the direction, and with the approval of the Bureau of Public Roads.

ARGUMENT: QUESTION 1.

It was Petitioner's contention in the United States Court of Claims that pursuant to 23 United States Code, Congress did, through the State of Ohio specifically permit Federal Funds to become obligated for the benefit of the Petitioner. The position taken by the Petitioner has created a most important Federal question which was decided on summary motion by the United States Court of Claims adverse to Petitioner's contention. Moreover, this Federal question presented by Petitioner has not heretofor been decided by the United States Supreme Court.

First of all, it must be understood that Congress did authorize funds to be used for the construction of Federal-Aid Highways throughout the 50 states. The Secretary of Commerce, upon Congress' authorizing the funds for the construction of the Federal-Aid Highways, apportioned the Federal Funds so authorized among the several states for expenditure pursuant to 23 United States Code 102 (Appendix B, page 6a) and 23 United States Code 104, as amended (Appendix B, page 6a). After the apportionments were made by the Secretary of Commerce, the State of Ohio submitted to the Secretary of Commerce a program of proposed projects for the utilization of the Federal Funds so apportioned. The program proposed by the State of Ohio was approved by the Secretary of Commerce and the Administrator of the Bureau of Public Roads as provided in accordance with 23 United States Code 105 (a) which states as follows:

> "As soon as practicable after the apportionments for the Federal-Aid systems have been made for any fiscal year, the State Highway Department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-Aid system."

and 23 Code of Federal Regulations 1.6 (a) which states as follows:

> "To insure continuity in the direction of expenditures of available funds, systems of Federal-Aid Highways are selected or designated by any State that desires to avail itself through its State Highway Department, of the benefits of Federal aid for Highways. Upon approval by the Administrator of the selections or designations by a State Highway Department, such highways shall become portions of the respective Federal-Aid Highway systems, and all Federal-Aid apportionments shall be expended thereon."

The case in question involves a number of revisions from the original proposed projects which were submitted and approved by the Federal Highway Administration in accordance

with 23 Code of Federal Regulations 1.6 (b) which states as follows:

> "A State Highway Department may propose revisions, including additions, deletions or other changes, in the routes comprising the approved Federal-Aid Highway systems. Any such revision shall become effective only upon approval thereof by the Administrator upon a determination that such revision is in the public interest and consistent with Federal laws. There is no predetermined time limit for the submission of the full selection of the systems."

After such approval of the program the State of Ohio through its highway department submitted to the Secretary of Commerce for approval surveys, plans, specifications and estimates of the proposed projects which were approved by the Secretary of Commerce. It is at this point that Petitioner contends that Congress has specifically permitted the Federal Funds to be obligated by the State of Ohio for the actual construction of the Federal-Aid Highways subject only to a project agreement between the State of Ohio and the Secretary of Commerce as set forth in 23 United States Code 110 (Appendix B, page 6a). Also subject to the letting of the contracts pursuant to 23 United States Code 112 (Appendix B, page 6a), wherein this Petitioner's contracts were submitted by closed bid approved by the Secretary of Commerce and subsequently signed by the State of Ohio.

Petitioner contends that the language of 23 United States Code 106 (a) which states as follows:

> "Except as provided in section 117 of this title, the State Highway Department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."

specifically permits the State of Ohio to obligate the Federal Funds for the specific use on an approved Federal-Aid Pro-

ject. It would be inconceivable that the State could sign a contract with Petitioner for the construction of Federal-Aid Highways knowing they had to pay for the cost of its construction from its own funds. It is Petitioner's contention that the State of Ohio was without sufficient funds to pay the enormous cost of construction of the Federal-Aid Highway in the State of Ohio. That the State of Ohio could proceed with the program only on basis that it was permitted to obligate Federal Funds for the actual construction of the Federal-Aid Highways. It is abundantly clear from the quoted language of 23 United States Code (Appendix B), that Congress intended to permit the Federal Funds to become obligated for the specific payments of the cost of construction, subject to the Petitioner constructing the Federal-Aid Highway in accordance with the executed contract which was submitted by Petitioner, approved by the Secretary of Commerce and signed by the State of Ohio, and subject to the inspection and final approval of the Bureau of Public Roads.

It was Petitioner's contention that he did perform in accordance with the terms of the contract and that his entire work product was inspected throughout by the Bureau of Public Roads and finally approved as being totally satisfactory by the Bureau of Public Roads.

The Respondent has suggested throughout its brief in support of its motion for summary judgment in the court below and the Court of Claims has suggested in its opinion (Appendix A) that the arrangement created by Congress pursuant to 23 United States Code was one of reimbursement, wherein the State of Ohio obligated and expended its own funds and then requested reimbursement from the Federal Government for a percentage of the cost of construction.

It has been and still is the Petitioner's contention that Respondent and the Court of Claims has been in error. First of all Congress was well aware of the meaning of reimbursement since they have referred to reimbursement in 23 United States Code 123 (a) wherein Congress provided as follows:

> "When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-Aid primary or secondary systems or on the Interstate system, including extensions thereof within urban areas, Federal Funds may be used to reim-

> burse the State for such cost in the same proportion as Federal Funds are expended on the project. Federal Funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-Aid Highway projects for which Federal Funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities."

therefore, it may well be concluded that Congress specifically avoided creating a reimbursable situation between the Respondent and the State of Ohio which is contrary to the decision of the United States Court of Claims (Appendix A) and Respondent's position in support of its motion for summary judgment. The language quoted in 23 United States Code (Appendix B) suggests that Congress has permitted the Federal Funds to be obligated by the State of Ohio for the benefit of the contractor who did the actual construction, thus making the Respondent legally responsible for the damages incurred by Petitioner.

ARGUMENT: QUESTION 2.

It is Petitioner's contention that cited language of Title 23 United States Code (Appendix A), Title 23 Code of Federal Regulations (Appendix C) and the facts involved does create an agency within the individual State Highway Departments, thus making the Respondent liable to Petitioner as principal for the claim herein.

The Respondent has completely eliminated any possibility of agency simply by failing to accept any of Petitioner's allegations asserted in the Court of Claims, and the Court of Claims merely stated in its opinion (Appendix A) that the acts of the Respondent were sovereign acts of the Respondent. Petitioner concurs that they were sovereign acts of the Respondent but not such sovereign acts as to give the Respondent immunity.

Petitioner contends that there is not just a grant of funds involved herein, but rather direct, substantial, and deliberate action of the Respondent pursuant to specific legislation and

that the injury to Petitioner is a direct taking of its property for a public work. It is the Respondent who has received a direct and substantial benefit from Petitioner's work product since it now has a Federal-Aid highway to be used for the National and Civil Defence and Interstate Commerce.

Congress has in fact permitted the individual states to obligate Federal Funds for the actual construction of Federal-Aid highways pursuant to 23 United States Code 105 (Appendix B, page 6a), 23 United States Code 106, (Appendix B, page 6a). However, subject to 23 Code of Federal Regulations 1.3 (Appendix C, page 36a), 23 United States Code 110, (Appendix B, page 6a) and 23 United States Code 112, (Appendix B, page 6a), the Bureau of Public Roads further exercised actual control over the construction of the Federal-Aid highways by having its employees and officers inspect the actual construction at different stages of the construction in order to insure that the highways were being constructed in accordance with the Federal regulations and specifications set forth in the contracts.

The contracts that were executed by the State of Ohio and Petitioner were orginally drafted by the Bureau of Public Roads and designed to protect the Respondent. All contracts were first submitted to the Bureau of Public Roads for approval, who then authorized the State of Ohio to sign the approval contracts.

Petitioner respectfully submits that the action by the Court of Claims in dismissing Petitioner's petition on summary motions has constituted an interpretation of an act of Congress not heretofore deceided by this Court. Petitioner further contends that the Court of Claims has erred in accepting the facts most favorable to the Respondent in light of a most important question not heretofore deceided by this Court.

ARGUMENT: QUESTION 3.

Petitioner argued in the Court below, that among other grounds, 23 United States Code constituted an Act of Congress under which the Court of Claims could both assume jurisdiction and grant the relief sought. Petitioner pointed to specific sections of 23 United States Code that allow him to bring his suit before the Court of Claims. Had he been allowed

to present proofs concerning actions of the Bureau of Public Roads, under the authority of 23 United States Code, the meaning and full scope of that legislation would have been made clear and Petitioner's position and contentions substantiated.

The Court below, by dismissing Petitioner on summary motion decided, among other things, that there was no Act of Congress (see 28 United States Code, sec. 1491 (2)) under which that court could assume jurisdiction and grant or refuse relief. In other words, Petitioner did not according to that court, state a cause of action under that jurisdictional clause (28 United States Code, sec. 1491 (2)) so as to give the Court of Claims jurisdiction.

> "Whether the Complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact, it must be decided after and not before the Court has assumed jurisdiction over the controversy." **Bell v. Hood**, 327 U. S. 678 (1946). (For further cases, see Petitioner's Brief in the Court below, page 17).

The Court of Claims not only decided this question of law without any proofs, affidavits or testimony before it but it also made many critical findings of fact, again without benefit of any record, before reaching the legal questions concerning the adequacy of Petitioner's petition in that Court.

This very important question of whether the quoted provisions of 23 United States Code (Appendix B) constitutes such an Act of Congress so as to permit persons harmed thereby to maintain an action in the Court of Claims should now be decided by this Court.

It is clear that the Congress, upon enacting the various quoted provisions of 23 United States Code (Appendix B), did not declare that only the several states should be responsible to those persons constructing Federal-Aid highways for contracted construction costs. Petitioner contended below that although the terms of that legislation neither affirmed or denied its contentions in explicit language, by fair implication it was afforded a right of recovery from the Respondent as well as the particular state involved. Even if it were the case that Congress did not envision such a situation as herein involved, this fact should have prompted a more thorough examina-

tion of Petitioner's claim below and now demands that this Court examine the quoted provisions of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C), so as to ascertain the intent of Congress.

This Court should further determine whether it is within the power of the United States Court of Claims to impose a particular interpretation upon statutory language, upon motion for summary judgment so as to deny Petitioner an opportunity to support allegations which, both under this Court's and the Court of Claims' rulings, would have allowed Petitioner recovery. This Court has said concerning claims founded upon Acts of Congress:

> ". . . . If the (Claimant) asserts that his claim 'arises under' or is 'founded on' federal legislation or regulations to determine whether that claim is well founded, the Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative." **Montana-Dakata Utilities Co. v. Northwest Public Service Co.**, 341 U. S. 246 (1952).

In dismissing Petitioner's Petition on summary motion, the Court of Claims ignored the above language of this Court and also its own recent holding in **Ralston Steel v. U. S.**, wherein it was said:

> "In general a Claimant also says that he is entitled to money from the United States because a statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claimss, at least if his claim is not frivolous but arguable. Where an Act of Congress or an executive regulation . . . . arguably confers such rights upon the Claimant the Court will assume jurisdiction and decide his case on the merits . . . ." (emphasis supplied).

Petitioner does not contend, contrary to the Court of Claims opinion (Appendix A) that other **Federal** Grants or other reimbursible aid programs are subject to the same right of recovery against the United States by a contractor for work performed. It is only the specific provisions of 23 United States Code (Appendix B) together with the Acts of the Department of Commerce, Bureau of Public Roads that Petitioner points to as constituting an Act of Congress allowing of recovery from the United States directly.

ARGUMENT: QUESTION 4.

It is Petitioner's contention that Congress through its power to regulate commerce and provide for the National Defense did take Petitioner's property for a public use without just compensation contrary to the Fifth Amendment of the United States Constitution.

It should be noted that Congress, in a declaration of policy, declared that it was in the National interest to accelerate the construction of Federal-Aid highways as our National highway system had been inadequate to meet the needs of the National and Civil defense and Interstate Commerce. 23 United States Code 101 (b) (Appendix B, page 6a).

It is abundantly clear that Petitioner's property in this case has been "taken" for this Court has held that "it is not necessary property be 'taken,' it is sufficient if the action by the Government involves a direct interference with a disturbance of property rights." **Pumpelly v. Green Bay Company, 80 U. S. 166 (1871); United States v. Lynah, 188 U. S. 445 (1903); United States v. Cress, 243 U. S. 316 (1917);** Nor need the government directly appropriate the title, possession, or use of the properties in question. **United States v. General Motors Corporation 323 U. S. 373 (1945).**

The ownership of the highways in question has no bearing on the issue of an unconstitutional taking of the property herein involved and this is supported by the above cases. "If the governments' . . . . (acts) make it possible for another to get the benefits of their property, the United States is liable just as if it used the property itself." **Ivey v. United States, 88 F. Supp. 6, 8, (1950).**

In the present case it was Congress who created the gigantic Federal-Aid highway system and who declared it to be most important for the National and Civil Defense and Interstate Commerce. It is Congress who created the Bureau of Public Roads, within the Department of Commerce, with the full power to carry out the responsibilities and authorities with respect to Federal-Aid highway construction, administration, and research as prescribed in 23 United States Code entitled "Highways."

The Court of Claims has in its opinion (Appendix A) indicated that the Petitioner has not made a showing that there

has been any affirmative acts on the part of the Bureau of Public Roads to as to deprive the Petitioner of its property or even interfere or disturb its property rights in question. This conclusion on the part of the Court of Claims, which is unquestionably denied by Petitioner, completely ignores the purpose for which the Federal-Aid highways were constructed, the entire cited language of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) and the actual on the job supervisory authority exercised by employees, officers and agents of the Bureau of Public Roads over this Petitioner during the construction of the Federal-Aid highways.

However, it certainly should be clearly understood that Petitioner has been unable to obtain all the factual information necessary to make certain allegations because the facts are possessed by employees, officers and agents of the Respondent and if given the opportunity the Petitioner will be able to point out to the Court specific times, places and the employees, officers and agents who have directly dealt with the Petitioner involving the claims in question.

Petitioner respectfully submits that the Court of Claims has erred in its opinion (Appendix A) and that the Petitioner should be given the opportunity to present his proofs in support of its allegations in order to establish that its property has been taken by Respondent in violation of the Fifth Amendment of the United States Constitution.

ARGUMENT: QUESTION 5.

Petitioner contends that his summary dismissal in the Court of Claims was erroneous in that the Court of Claims thereupon did decide material issues of fact and law contrary to Rule 64 Court of Claims Rules, and Rule 20 (b) Court of Claims Rules and contrary to innumerable decisions of this Court.

Moreover, Petitioner contends that the legislation involved herein is of such national import, expending such large sums of money and affecting such a number of persons, that the questions herein raised and incidentally decided by the Court of Claims should be accorded a full hearing and certainly not be dismissed on summary motions. Certainly constitutional

and other questions of a large public import should not be decided on an inadequate factual basis. (See **Poller v. C.B.S.**, 368 U. S. 464.)

There were issues of fact and law concerning the extent of Respondent's contact with Petitioner, the legal consequences of such contacts, the construction of the language contained within 23 United States Code as to whether Congress was merely "reimbursing" the several states or had created an entirely different situation so as to admit of liability to parties other that the several states. Upon this point the Court of Claims rested its decision upon allegations of reimbursement contained within Respondant's brief in support of the motion for summary judgment, apparently dismissing Petitioner's allegations to the contrary and further relying upon the case of **Eden Memorial Park Association v. United States**, 300 F. 2d 432, 439 (Appendix A), a case wherein none of the issues at bar here were before the Court, although seemingly the only instance wherein the language of a decision of a Federal Court deals with the agency on non-agency of State and Federal acts under the quoted provisions of 23 United States Code (Appendix B).

Petitioner maintains that if this is to be the law, respecting a rather important enactment of Congress, it should be so only upon a more complete hearing and an examination of the proofs that might be offered in support of Petitioner's contention concerning the interpretation and construction of the language contained within 23 United States Code (Appendix B) as well as 23 Code of Federal Regulations (Appendix C).

The Court of Claims has, by its decision (Appendix A) passed upon the legal questions presented for this Court's consideration on the basis of the original petition as submitted to that Court. This Court has not, as yet, had the occasion to interpret the quoted provisions of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) that Petitioner points to as according him the right to be heard in the Court of Claims and therefore, it is submitted that this question should now be decided by the Supreme Court of the Court of the United States so as to clear up the ambig-

ui'les contained therein concerning the liability of the United States Government in this instance.

Petitioner further contends that the petition submitted in the Court of Claims certainly encompased broad enough language as to allow possible amendments should proofs allow such amendments.

The action of the Court of Claims has precluded Petitioner from ever submitting his claim for a fair and impartial hearing before a competent judicial body. It is obvious from the very nature of the case that those are enormous factual and legal questions presented; however, the opinion of the Court of Claims (Appendix A) has summarily decided all the factual and legal questions most favorably to the Respondent and contrary to the position taken by the Petitioner.

Petitioner contends that should this Court grant this Writ of Certiorari that it will be able to clearly point out the immumerable legal and factual questions presented by Petitioner, and incidentally substantiate his contention that the Court of Claims has committed substantial error by granting Respondent's motion for summary judgment.

ARGUMENT: QUESTION 6.

Concerning the last question presented for this Court's consideration: The Court below held, in its opinion granting Respondent's motion for summary judgment, that there were no acts alleged on the part of Respondent which would give rise to liability in this instance (Appendix A). Petitioner contends that the petition and brief opposing summary judgment clearly points to multiple affirmative acts by Respondent, as do the facts as set forth within this petition and again, Petitioner would point out that the Court below was at this point deciding factual issues, at best, and more probably ignoring or dismissing Petitioner's allegations as to the actions and involvements of Respondent's agents and officers.

The decision of the Court of Claims on this point raises, indeed, some very serious questions concerning the protections of the Fifth Amendment of the United States Constitution.

Pitioner has steadfastly maintained in the Court below that the acts of Respondent's agents and officers, and as au-

thorized by quoted provisions of 23 United States Code (Appendix B) resulted in Petitioner's loss.

The impact and fair import of the Court of Claims decision is that Congress may (now) enact legislation initiating Federal programs such as that involved herein, placing the responsibility for administration, direction, and all final decisions involving such programs with a Federal agency, directing that the Federal agency inspect and approve as in this instance a State Highway Department, the contractor, its bid, all work done (dealing directly with the contractor all the while), materials used, and the final product, appropriate funds and pledge the credit of the United States Government for such programs, ultimately complete such programs through the efforts of persons such as your Petitioner, and then deny responsibility for non-payment of sums owing on the grounds that the particular states involved were the signators or parties to the construction contracts.

To say further, as the Court of Claims has done, that the United States Constitution does not require that compensation be made in such cases as in herein involved is to ignore not only past decisions of that Court, but also of this honorable Court.

A serious question requiring this Court's attention is thus raised: May the United States participate and control to the extent that it has in the instant case and others pursuant to congressional authorization and deny liability for payment of monies pledged on the grounds that the states are only parties responsible, without violating the provision of the United States Constitution and particularly the Fifth Amendment? Similarly, did Congress intend by the quoted provision of 23 United States Code (Appendix B) and 23 Code of Federal Regulations (Appendix C) to place the entire responsibility for the implementations of the programs therein envisioned with the Department of Commerce, Bureau of Public Roads, and at the same time insulate the United States from any liability for payment to persons such as Petitioner herein when a state, in violation of the provisions of that legislative program refuses to complete payments upon contracts let and completed pursuant to such programs?

Petitioner respectfully submits that this is the interpretation

that the Court of Claims has placed upon the legislation involved, and as such, this interpretation does not comply with the requirements of due process of law under decisions of this Court.

CONCLUSION

The questions presented on the Writ of Certiorari are of public importance, effecting both the Federal and State highway construction program, the highway construction industry and a broad spectrum of governmental morality. They involve the responsibility and obligation of the Federal government. There are numerous questions of both fact and law which have not heretofore been decided by this Court. The questions involve the constitutional rights of all persons who may be involved in the construction of Federal-Aid highways. Petitioner submits that the precedents established by this Court do not support the decision of the Court of Claims but require its reversal so that Petitioner may proceed with the trial of the questions involved. The questions presented as so substantial as to require plenary consideration with brief on its merits and oral argument for their resolution.

May 10th, 1967

Respectfully submitted,
DONALD A. MOON
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